

1 THE HONORABLE ROBERT S. LASNIK  
 2 THE HONORABLE RICHARD A. JONES  
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7 UNITED STATES DISTRICT COURT  
 8 WESTERN DISTRICT OF WASHINGTON  
 9 AT SEATTLE

10 BRUCE KEITHLY, DONOVAN LEE, and  
 11 EDITH ANNA CRAMER, Individually and on  
 Behalf of all Others Similarly Situated,

12 Plaintiffs,

13 v.

14 INTELIOUS, INC., A Delaware Corporation; and  
 15 INTELIOUS SALES, LLC, A Nevada Limited  
 Liability Company,

16 Defendants.

17 Case No. C09-1485 RSL

18 PLAINTIFFS' REPLY IN SUPPORT  
 OF MOTION TO CONSOLIDATE  
 CASES AND APPOINT INTERIM  
 CLASS COUNSEL

19 Noted for Consideration: April 16, 2010

20 MATTHEW BEBBINGTON, Individually and  
 21 on Behalf of all Others Similarly Situated,

22 Plaintiffs,

23 v.

24 INTELIOUS, INC., A Delaware Corporation; and  
 25 INTELIOUS SALES, LLC, A Nevada Limited  
 Liability Company,

26 Defendants.

Case No. C10-500 RAJ

1 Plaintiffs Bruce Keithly, Donovan Lee, Edith Anna Cramer, and Matthew Bebbington,  
 2 through their counsel, submit this reply in support of their motion to consolidate the above-  
 3 captioned cases, appoint each named Plaintiff as interim lead plaintiffs, and appoint the law firms  
 4 Cohen Milstein and Keller Rohrback as interim class co-counsel.

5 **ARGUMENT**

6 In Defendants Intelius, Inc. and Intelius Sales, L.L.C.'s (collectively "Defendants" or  
 7 "Intelius") response to Plaintiffs' motion, Defendants indicate that they do not oppose Plaintiffs'  
 8 request to transfer *Bebbington v. Intelius, Inc. et al.*, Case No. C10-500 RAJ (the "Bebbington  
 9 action") for consolidation with *Keithly v. Intelius, Inc. et al.*, Case No. C09-1485 RSL (the  
 10 "Keithly action"). Thus, the Court should consolidate those actions for the reasons stated in  
 11 Plaintiffs' underlying motion pursuant to Fed. R. Civ. P. 42(a).

12 With respect to Defendants' contention that the request should not delay or otherwise  
 13 impact the Court's consideration of Defendants' motion to dismiss currently pending before the  
 14 Honorable Robert S. Lasnik, Plaintiffs submit that the instant motion to consolidate should be  
 15 determined *before* the motion to dismiss. Federal district courts routinely consolidate cases in  
 16 similar circumstances. For example, one district court faced with two related actions and a  
 17 pending motion to dismiss *sua sponte* determined that consolidation was appropriate before  
 18 determining the motion to dismiss. *See Ashcroft v. New York State Dept. of Corr. Servs.*, No.  
 19 07-721, 2009 WL 1161480, at \*2 (W.D.N.Y. April 29, 2009). The court specifically held that  
 20 "[c]onsolidation will not cause confusion or prejudice in the management of the case; rather, the  
 21 pending motion to dismiss as to the claims now to be consolidated into the first action ... may  
 22 refine these issues while not delaying progress in either case." *Id.* (citing 9 Charles A. Wright &  
 23 Arthur R. Miller, *Federal Practice and Procedure* § 2383 (Civil 2d ed.)); *see also Apostolou v.*  
 24

1       *Gelderman, Inc.*, 919 F. Supp. 289, 292 (N.D. Ill. 1996) (finding that the consolidation of eleven  
 2 cases was appropriate prior to resolution of a motion to dismiss).

3           After the cases are consolidated, the transferee judge has the discretion to consider the  
 4 allegations made in the transferred case. *See, e.g.*, 9 Wright & Miller, § 2383 (Civil 3d ed.)  
 5 (“[O]nce cases have been consolidated, if the focused issues they address are common to all of  
 6 the actions, the district judge on his or her own initiative may consider motions directed at one of  
 7 the cases as if they were directed at all of the consolidated cases.”). The wisdom of this  
 8 approach is plainly evident: it would be a waste of judicial resources and contrary to the spirit  
 9 and policy of Fed. R. Civ. P. 42(a) if the parties were exposed to inconsistent adjudications of  
 10 common legal issues. Here, there are additional allegations in the *Bebbington* action which  
 11 warrant their inclusion into the Court’s consideration when ruling on Defendants’ motion to  
 12 dismiss the *Keithly* action. For instance, the *Bebbington* action alleges that Defendants hired  
 13 “psychologists and behavioral specialists to carefully design the [webpages] to hit human  
 14 psychological cues and obfuscate any purported disclosures, in an effort to cause Plaintiff and  
 15 the Class to inadvertently enroll in the Negative Option Programs.” *See Bebbington Compl.*,  
 16 ¶ 22. These allegations are centrally related to whether Defendants have engaged in deception in  
 17 violation of the Washington Consumer Protection Act, RCW Ch. 19.86 *et. seq.* As a result, the  
 18 Court should consider the claims raised by the *Bebbington* complaint when ruling on the pending  
 19 motion to dismiss. Alternatively, the Court in its discretion may certainly direct Plaintiffs to file  
 20 an amended consolidated class complaint.  
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24           Defendants also suggest that Plaintiffs’ request for appointment of interim class counsel  
 25 is both unnecessary and premature, claiming that Defendants intend to oppose Plaintiffs’ request  
 26 for class certification. However, Defendants do not cite any authority or case law for this

1 proposition, nor do they otherwise assert any facts which would preclude the Court from making  
2 a determination on whether to appoint interim class counsel at this time. The Federal Rules of  
3 Civil Procedure explicitly provide that interim class counsel may be appointed *prior* to any  
4 request for class certification, thereby undermining any objection raised by Defendants that they  
5 will somehow be prejudiced by the Court's ruling on this issue before class certification. *See*  
6 Fed. R. Civ. P. 23(g)(3) ("The court may designate interim counsel to act on behalf of a putative  
7 class *before* determining whether to certify the action as a class action.") (emphasis added).

9 Finally, Plaintiffs note that on April 14, 2010, the Multidistrict Judicial Panel on  
10 Litigation ("JPML") denied Defendants' motion for centralization pursuant to 28 U.S.C. § 1407  
11 of a related action pending in the Central District of California. *See* Dkt. #42 in the *Keithly*  
12 action. The JPML's order means that both the *Keithly* and *Bebbington* actions will be litigated in  
13 this district and that the California action will not be transferred here. With the JPML motion no  
14 longer pending, there is no reason to postpone consideration of Plaintiffs' motion to consolidate  
15 for appointment of interim class counsel. Plaintiffs therefore request that the Court grant their  
16 motion in its entirety.

18 **CONCLUSION**

19 For the foregoing reasons, Plaintiffs respectfully ask the Court to enter the proposed order  
20 submitted by Plaintiffs with their original motion for consolidation.  
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1 DATED this 16th day of April, 2010.

2 KELLER ROHRBACK L.L.P.  
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14 *Counsel for Plaintiffs Bruce Keithly, Donovan*  
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**CERTIFICATE OF SERVICE**

I hereby certify that on April 16, 2010, I caused to be served a true and correct copy of the MOTION TO CONSOLIDATE CASES AND APPOINT INTERIM CLASS COUNSEL on the following recipients via the method indicated:

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DATED this 16th day of April, 2010.

s/Karin B. Swope  
Karin B. Swope